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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 140

ALMA F. BIRCKNER, PETITIONER,

VS.

ROBERT TILCH ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MARYLAND, AND BRIEF IN SUPPORT THEREOF.

WILLIAM J. O'MAHONY,
Attorney for Petitioner.

T. EMMETT MCKENZIE,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MARYLAND.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Alma F. Birckner, petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the court of appeals for the State of Maryland, filed in the above-entitled cause on February 19, 1941, affirming judgment of the Circuit Court for Prince George's County, Maryland; petitioner's motion for reargument overruled April 9, 1941.

SUMMARY STATEMENT OF MATTER INVOLVED.

On February 1, 1933, one Richard Stein executed his last will and testament. With the exception of that certain parcel of land made the subject matter of this cause, said will disposed of testator's Maryland real estate spe-

cifically. That said parcel was expressly excluded. The will contained a comprehensive residuary clause, embracing realty and personalty (R. pp. 15-17).

On November 9, 1936, for a valuable consideration, testator executed a written contract under seal for the sale of said parcel of land to one Charles W. Collins. Said contract directed testator's executor to deliver special warranty deed within thirty days next succeeding testator's death; empowered testator's executor to decline to convey upon failure of vendee to pay the full purchase price when due; in express and imperative terms commanded sale by the executor at all events; and declared the instrument to be a binding obligation upon the parties, their heirs, executors, administrators and assigns (R. pp. 21-23).

On October 26, 1937, testator died (R. p. 6) and his will subsequently put in probate.

On November 12, 1937, seventeen (17) days subsequent to testator's death, Robert Tilch, testator's executor and legatee, without judicial, testamentary, or other authority extended the term and provisions of testator's contract of sale of said land for the period of one year (R. pp. 24-26).

The vendee under said contract refused to perform his obligations thereunder (R. p. 26).

The executor never made effort to enforce the rights of his testator in said contract (R. pp. 46-47, 63-64); despite written demand, made upon him by petitioner, to take appropriate action to protect petitioner's rights in the subject matter of the cause (R. p. 65).

On December 5, 1939, twenty-five (25) months and ten (10) days subsequent to testator's death, and twenty-four (24) months and twenty-three (23) days subsequent to said executor's unauthorized extension agreement, the said executor, disavowing and renouncing his obligation as executor and trustee, and acting as legatee only (R. p. 64), filed bill in equity in the Circuit Court for Prince

George's County, Maryland, under Section 159, of Article 16, only, of the Annotated Code of Maryland (Flack, 1939), praying judicial sale of the subject matter of the cause. The said bill alleged execution of the will, contract and extension aforementioned which were each annexed to the bill as exhibits *in haec verba;* that the testator was, at the time of his death, owner of said property in fee simple; that the said will devised the said land to the executor-legatee-complainant and others; that partition in kind could not be had without material loss to the parties (R. pp. 5-10).

On March 21, 1940, petitioner filed amended answer denying the existence of any devise as alleged in the bill; pleading the doctrine of equitable conversion, as effected by said contract of sale, as a defense to the statutory right of action which relates to realty only; and asserting the court was entirely and fundamentally without jurisdiction in the cause; and praying for dismissal thereof together with other and proper relief (R. pp. 35-36).

On September 6, 1940, the trial court entered decree providing for sale as prayed by plaintiff (R. pp. 70-72).

Thereafter appeal to the Court of Appeals for the State of Maryland was duly taken and entertained, and on February 19, 1941, that court affirmed the decree of the trial court with costs to the appellee (R. pp. 86-95).

On March 18, 1941, petitioner, surprised by reason of the hypothesis upon which the said court of appeals based its decision, filed motion for reargument, contending the said court of appeals had refused to determine the question presented on appeal; had rested its decision upon other and legally untenable grounds; and had, in so doing, deprived petitioner of property without due process of law as defined in the Constitution of the United States; and requested a ruling by said court of appeals in the light of the said constitutional right of petitioner (R. pp. 97-99).

On April 9, 1941, the said court of appeals, having entertained and considered the said motion, overruled same (R. p. 99).

QUESTIONS PRESENTED.

I.

Whether the court of appeals below based its decision upon erroneous principles of law.

II.

Whether the court of appeals below failed to consider and determine a decisive point raised by petitioner in the appeal.

III.

Whether the judgment of the court of appeals below, overruling petitioner's motion for reargument, decided a federal question of substance in a way not in accord with applicable decisions of this court.

IV.

Whether the judgment of the court of appeals below deprived petitioner of property rights in violation of the provisions of Section 1 of Article XIV of the Constitution of the United States.

REASONS RELIED UPON FOR THE GRANTING OF THE WRIT.

The writ should be allowed by this court for the following reasons:

I.

The court of appeals below, in the case here presented, has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's power of supervision thereover.

Petitioner sought to obtain from the said court of appeals its determination of the scope and effect of the trust imposed upon the executor-legatee-complainant, by testator's will and subsequent contract of sale of the subject matter of the cause; and its decision respecting the powers, authority and obligations of the trustee thereunder. Said court of appeals refused to consider or determine these propositions; notwithstanding the record most clearly demonstrates establishment of jurisdiction to entertain the bill of complaint in the trial court—in the sense of fundamental absence of any and all right to take cognizance of the cause—depended solely and entirely upon determination of those propositions, as alleged on appeal.

II.

The court of appeals below having defined in the testator's contract of sale of the subject matter of the cause all the elements requisite to operation of the doctrine of equitable conversion, as of the date of testator's said contract of sale, held:

(a) The executor-trustee-legatee-complainant's subsequent activities respecting the trust estate, undertaken *sua sponte*, and entirely without testamentary, contractual, or judicial authorization, operated as a rescission of testator's contract of sale;

(b) Authority to rescind his testator's contract of sale devolved upon the executor-trustee-legatee-complainant as matter of personal right, without regard to the terms of the instruments creating the trust; the vested rights of the *cestui que trustent*; or the established legal and equitable limitations upon the duties, powers, and authority of trustees.

These conclusions were based upon erroneous principles of law and violate the due course of proceedings, according to those rules and forms which have been established for the protection of private rights by the law of the land.

III.

The court of appeals below in concluding there was jurisdiction of the subject matter of the cause, has not given proper effect to applicable decisions of this court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued by this court, directed to the Court of Appeals for the State of Maryland, commanding that court to certify and send to this court, for review and determination, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket as, to-wit: "Alma F. Birckner *et al.*, Appellant, versus Robert Tilch *et al.*, Appellee, Appeals No. 15, January Term, 1941," and that the judgment of the court of appeals below be reversed by this court, and that your petitioner may have such other and further relief in the premises as to this court may seem just and proper.

And your petitioner will ever pray.

WILLIAM J. O'MAHONY,
Counsel for Petitioner.

T. EMMETT MCKENZIE,
Of Counsel.